SUPREME COURT

OF THE

UNITED STATES

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No. 172

THE WASHINGTON WATER POWER COMPANY, a corporation, THE CITY BANK FARMERS TRUST COMPANY, a corporation, and RALPH E. MORTON, as Trustee, STEVENS COUNTY, WASHINGTON, and FERRY COUNTY, WASHINGTON.

Petitioners,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit, and Brief in Support Thereof.

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Petitioners,

vs.

UNITED STATES OF AMERICA.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

The petitioners, The Washington Water Power Company, a corporation, The City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, as trustee, and Ferry County, Washington, and Stevens County, Washington PRAY that a writ of certiorari issue to review the decree entered in the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled matter which decree was filed and entered April 30, 1943, (R. p. 338) affirming, as modified by striking therefrom the judgments in favor of Stevens and Ferry Counties, the judgment of the District Court of the United States for the Eastern District of Washington, Northern Division. The opinion (R. pp. 332-338) upon which the Decree of the Circuit Court of Appeals was entered is reported in 135 Fed. (2d) 541.

Summary Statement of the Matter Involved

In the course of the condemnation suit at bar the United States of America had judgment entered upon a declaration of taking giving it title to and possession of the lands at Kettle Falls on the Columbia River, which, prior to the time of taking, were held and being developed by The Washington Water Power Company for power site purposes. At the subsequent trial of said cause it was stipulated that the lands so taken had a value of $7,950.35 for any or all purposes for which they are adapted other than power site values (R. p. 45).

At the time of the trial in the District Court The Washington Water Power Company made many offers of proof by different witnesses the substance of which was: That the land in question had been recognized in surveys and studies as one of the most suitable and feasible sites on the Columbia River for the development of electrical energy (R. p. 134). That the State of Washington, acting by and through its land commissioner, had agreed to sell the shore lands on each side of the Columbia River to The Washington Water Power Company and that the agreement was in full force and effect when the United States authorized and adopted the Grand Coulee Dam project (R. pp. 137, 138). That the investment of The Washington Water Power Company for necessary preliminary engineering and survey work, including the cost of the lands, was the fair and reasonable sum of $465,785.97 (R. p. 160). That The Washington Water Power Company had the financial capacity

and was ready to develop the land as a power site as soon as the needs and demands of the Company required its construction (R. pp. 232, 233). That various qualified experts would testify as to the reasonable market value of the property on the basis of its value for a power site at the time of taking. The said value according to the offers of proof by such experts was approximately $500,000.00.

After rejecting all the said offers of proof the learned District Judge instructed the jury to bring in verdicts for defendant, The Washington Water Power Company, for $7,950.35, in the sum of $1,950.76 for defendant Stevens County, and for $1,033.20 for Ferry County, Washington. The two last mentioned sums represented the amounts due each of the counties for taxes levied and assessed during the year 1939 when the United States acquired title and possession of the land with interest thereon. Judgments were entered in favor of each of the aforesaid defendants for the amounts of the verdicts which the jury returned in accordance with the instruction of the trial judge.

Two appeals followed the entry of the judgments. One by The Washington Water Power Company from the judgment in its favor for $7,950.35, the other by the United States from the judgments in favor of each of the defendant counties.

The Circuit Court of Appeals affirmed the judgment appealed from by The Washington Water Power Company, but modified the judgment entered by the District Court by striking therefrom the judgments in favor of Stevens and Ferry Counties (R. p. 339).

JURISDICTIONAL STATEMENT

Statutory Provisions Believed to Sustain Jurisdiction

The jurisdiction of this Court is invoked under Judicial Code Section 240 amended, Title 28 U.S.C. Section 347 (a). Mar. 3, 1891, c. 517, §6, 26 Stat. 828; Mar. 3, 1911, c. 231, §240, 36 Stat. 1157; Feb. 13, 1925, c. 229, §1, 43 Stat. 938; Jan. 31, 1928, c. 14, §1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926).

Cases believed to sustain the jurisdiction of this Court are:

S. S. Ansaldo San Giorgio I vs. Rheinstrom Bros. Co., 294 U. S. 494, 79 Law. ed. 1016, 55 S. Ct. 483.

United States vs. Miller, 317 U. S. 369, 87 Law. ed. (Adv.) 251, 63 S. Ct. (Adv.) 276.

The United States of America Upon the Relation and for the Use of the Tennessee Valley Authority, Petitioner, vs. W. V. N. Powelson, Assignee and Successor in Interest of Southern States Power Company, et al. 318 U. S. ....., 87 Law. ed. (Adv.) 976.

Date of Decree

The date of the decree of the United States Circuit Court of Appeals for the Ninth Circuit, which it is sought to have reviewed, is April 30, 1943 (R. p. 338). June 5, 1943, the Circuit Court of Appeals entered an order denying petition of appellants for a rehearing (R. pp. 339).

NATURE OF THE CASE AND RULINGS OF THE COURT

The United States of America acquired property owned by The Washington Water Power Company by virtue of a judgment upon its declaration of taking December 9, 1939 (R. pp. 33-43).

It was stipulated by and between the United States of America and The Washington Water Power Company that the lands of the defendant The Washington Water Power Company, being condemned in this proceeding, have a reasonable value for agricultural, grazing and timber purposes and for all or any other purposes for which they are adapted other than for power site values equal to the amount deposited in the Court by the plaintiff as the estimated value of the said tract of land, to-wit: The sum of Seven Thousand Nine Hundred Fifty and 35/100 Dollars, ($7,950.35). (R. p. 45)

At the time of the trial in the District Court The Washington Water Power Company made a series of offers of proof (R. pp. 133-241) the substance of which was: That the land in question had been recognized in surveys and studies as one of the most suitable and feasible sites on the Columbia River for the development of electrical energy. That by virtue of contract The Washington Water Power Company had acquired the right to purchase the shore lands on each side of the Columbia River, which right was in existence when the United States authorized and adopted the Grand Coulee Dam project. That the investment of The Washington Water Power Company in the

property condemned was $465,785.97. That The Washington Water Power Company was financially able and was ready to develop the land as a power site within the reasonably near future and that its application for Federal license to develop same was pending at the time the Grand Coulee Dam project was adopted by the Government. That the reasonable market value of the property on the basis of its value for power site purposes at the time of taking was approximately $500,000.00.

Objections to each and all of The Washington Water Power Company's said offers of proof were sustained by the Court and exceptions taken by The Washington Water Power Company to each of the said rulings sustaining such objections were allowed by the Court.

The above mentioned offers of proof by The Washington Water Power Company having been objected to and the objections having been sustained The Washington Water Power Company rested.

Ferry County, Washington, proved the amount of the tax and interest levied and assessed against the property in 1939 upon the lands of The Washington Water Power Company taken and submerged by the Government in Ferry County (R. pp. 66-78). Defendant Stevens County introduced evidence as to the amount of the tax and interest levied and assessed against the property in 1939 that had been taken and submerged by the United States in that county (R. pp. 79-85). No evidence was introduced by the Gov-

ernment to dispute the testimony offered on behalf of Stevens and Ferry Counties.

At the time of the taking, that is December 9, 1939, (R. p. 43) the taxes for the year 1939 were an existing lien upon the property taken (Rem. Rev. Stat. Sec. 11265). Stevens and Ferry Counties of Washington were made parties defendant by the United States of America, (R. p. 3) and the Government by its declaration of taking (R. p. 20) and the judgment entered thereon took the fee simple title to the lands herein condemned (R. p. 33).

All the parties to the trial having rested, the learned judge of the District Court instructed the jury to return a verdict in favor of the defendant The Washington Water Power Company in the sum of $7,950.35 (R. p. 247), and also instructed the jury to return a verdict in favor of the defendant Stevens County in the agreed sum of $1,950.76, and for the defendant Ferry County in the agreed sum of $1,033.20 (R. p. 248). The Washington Water Power Company and the United States of America were each allowed exceptions to the Court's instructions to the jury (R. p. 248). The jury returned verdicts in accordance with the Court's instructions and the judgment of the District Court was entered thereon for the amounts of said verdicts.

The Washington Water Power Company appealed to the Circuit Court of Appeals from the judgment entered by the trial judge on the verdict in its favor for $7,950.35, and the United States of America likewise

appealed from that part of the judgment which was predicated upon the jury's verdicts in favor of Ferry and Stevens Counties for the taxes levied and assessed for the year 1939.

The Circuit Court of Appeals entered a decree, modifying the judgment of the District Court by striking therefrom the judgments of Stevens and Ferry Counties and affirmed the judgment as modified (R. p. 338), Reported in 135 Fed. (2d) 541.

It is that decree of the Circuit Court of Appeals which petitioners seek to have reviewed.

Questions Presented

(1) If land be the only land available for the purpose of a damsite on a navigable river and as such has a market value which can fairly be determined because of its probable use in connection with a damsite in the reasonably near future, can the United States of America as an incident of the taking deny a permit for a license to develop the project of which the land is an indispensable part, and thereby be excused from paying just compensation measured by the value of the property at the time when the license was denied as an incident of the taking?

(2) Can the United States of America acquire title in fee simple to lands subject to a valid and existing tax lien, by making the County having such tax lien a party to a suit in eminent domain, and having judgment entered on a declaration of taking, granting it title in fee simple, without becoming liable to

the County for the amount of the taxes constituting such lien, under a Washington Statute which expressly provides that as between buyer and seller such lien shall not attach until a definite calendar date, when the construction given such Washington Statute by the Supreme Court of that State makes it applicable to condemnation suits and construes the lien as not attaching between condemnee and condemnor in the case of land acquired prior to the date fixed by Statute when such lien shall attach as between buyer and seller?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

We believe that in the case at bar the questions above set forth are fairly presented by the record.

In making the decision sought to be reviewed the United States Circuit Court of Appeals for the Ninth Circuit has, we believe, decided a Federal question in a way probably in conflict with an applicable decision of this Court—i. e. *United States v. Chandler-Dunbar Water Power Company*, 229 U. S. 53, 57 Law. ed. 1063, 33 S. Ct. 667, wherein this Court held that the respondent in the condemnation suit was entitled to recover from the United States the value of lands adjoining a navigable river for use for canal and lock purposes. In view of the very large number of condemnation suits by the United States which are now pending we believe and respectfully urge that the Writ of Certiorari should be granted because of the public importance of the issues presented by each and both of the foregoing questions.

See: *United States vs. Miller,* 317 U. S. 369, 87 Law. ed. (Adv.) 251. *The United States of America Upon the Relation and for the Use of the Tennessee Valley Authority, Petitioner, vs. W. V. N. Powelson, Assignee and Successor in Interest of Southern States Power Company, et al.,* 318 U. S....., 87 Law. ed. (Adv.) 976.

For these reasons it is respectfully prayed that this petition should be granted.

Respectfully submitted,

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Attorney for petitioners, The Washington Water Power Company, a corporation, The City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, as Trustee.

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Of counsel for petitioners, The Washington Water Power Company, a corporation, The City Bank Farmers Trust Company, a corporation, and Ralph E. Morton, as Trustee.

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Of Counsel for Petitioner, Stevens County, Washington.

OSEE W. NOBLE
Of Counsel for Petitioner, Ferry County, Washington.

STATE OF WASHINGTON }
COUNTY OF SPOKANE } ss.

Henry E. T. Herman and Richard W. Nuzum, members of the Bar of the Supreme Court of the United States and counsel for petitioners herein, do hereby certify that the foregoing petition is well founded and not interposed for delay.

HENRY E. T. HERMAN
RICHARD W. NUZUM